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NASHVILLE

October 10th, 2024

The Honorable Jonathan Skrmetti
Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202-0207

Dear General Skrmetti:

The formal opinion of your office is requested with regard to the following questions:

1. Would a proposed amendment to Tenn. Code Ann. §§ 68-221-906 that prohibits the Board of Water and Wastewater Operator Certification (the Board) from entering into a contract, agreement, or other arrangement with a third party regarding testing services, including exam validation services performed by psychometricians, for its operator certification program be constitutionally suspect under the Contract Clause of the Tennessee Constitution, the Supremacy Clause of the United States Constitution, or other constitutional provision?

2. Would such a state prohibition on utilizing third-party testing services pose a risk of violation of the Safe Drinking Water Act (SDWA) and applicable federal regulations?

3. If the answer to Question 2 is yes, what is the likely effect of such a violation of the SDWA on federal Drinking Water State Revolving funds allocated to the State?

4. Under current law, if the Board contracts with a third-party testing service provider to use a standardized exam that does not contain any customized or state-specific regulatory questions, or that does not otherwise align with the current classification system established in Tenn. Code Ann. § 68-221-907 and regulations promulgated under the authority of the Board, would the Board be in violation of Tenn. Code Ann. § 68-221-907 and regulations promulgated under the authority of the Board, or other provision of law?

The following summarizes the relevant law and background:

Safe Drinking Water Act and the Drinking Water State Revolving Fund

In 1974, Congress enacted the Safe Drinking Water Act (SDWA) "to assure that water supply systems serving the public meet minimum national standards for protection of public health." *City of Evansville, Inc. v. Ky. Liquid Recycling*, 604 F.2d 1008, 1016 n. 25 (7th Cir.1979) (quoting H.R.Rep. No. 93– 1185, reprinted in [1974] U.S.Code Cong. & Admin. News at 6454), cert. denied, 444 U.S. 1025, 100 S.Ct. 689, 62 L.Ed.2d 659 (1980). With minor exceptions, the SDWA applies "to each public water system in each State." 42 U.S.C. § 300g. The SDWA enables the Administrator of the Environmental Protection Agency (EPA) to "publish maximum contaminant level goals and promulgate national primary drinking water regulations." Id. § 300g–1(b)(1).

In 1996, Congress amended the SDWA to require operators of public water systems to be certified, and directed the EPA to establish minimum standards for the certification and recertification of those operators. 42 U.S.C.A. § 300g-8; SDWA Amendments of 1996 (Pub. L. 104-182). Section 1419(a) of the SDWA states, ". . . [I]n cooperation with the States, the Administrator shall publish guidelines in the Federal Register, after notice and opportunity for comment from interested persons, including States and public water systems, specifying minimum standards for certification (and recertification) of the operators of community and nontransient noncommunity public water systems."

Section 1452 of the 1996 amendments to the SDWA established the "Drinking Water State Revolving Fund" (DWSRF) which provides grants to States to help water systems make infrastructure or management improvements or to help systems assess and protect their source water. 42 U.S.C.A. § 300j-12; 40 C.F.R. § 35.3500. Section 1419(b) of the SDWA requires the EPA to permanently withhold twenty percent of those DWSRF funds a State is otherwise entitled to if the State fails to adopt and implement a program for the certification of operators of public water systems that meets the requirements of the federal guidelines mandated by Section 1419(a) of the SDWA. TDEC's Division of Water Resources administers the DWSRF program.

In 1984, the General Assembly enacted the "Water Environmental Health Act" which is currently known as the "Water and Wastewater Operator Certification Act" (the Act). Tenn. Code Ann. §§ 68-221901 – 915. The Act established the Board of Water and Wastewater Operator Certification (the Board to administer a system of certification of operators of water and wastewater systems in Tennessee, including penalties for noncompliance. The Board is required to "[h]old at least one (1) examination annually at a designated time and place for the purpose of examining candidates for certification" and "[p]repare, conduct and grade examinations". Tenn. Code Ann. §§ 68221-906(a)(2); -906(a)(7). After considering the recommendations of the Board, the Commissioner of Environment and Conservation must issue a certificate of competency stating that the operator of a water or wastewater system has met the requirements for the specified operator classification of the certification program. Tenn. Code Ann. §§ 68-221-904; -908. TDEC's Division of Water Resources administers the enforcement program that requires water suppliers to meet the requirements of the SDWA. Tenn. Code Ann. §§ 69-7-101 – 104.

SDWA's Final Guidelines and Testing Validation Requirement

On February 5, 1999, the EPA published the Final Guidelines in the Federal Register that apply to all state operator certification programs. 64 Fed. Reg. 5916. Tennessee is currently implementing an EPA-approved operator certification program. On April 18, 2001, the EPA published the "Final Additions to the Final Guidelines for the Certification and Recertification of the Operators of Community and Nontransient Noncommunity Public Water Systems" in the Federal Register. 66 Fed. Reg. 19939.

The 1999 Final Guidelines state:

> *"States **must require** the following for an operator to become certified: - Take and pass an exam that demonstrates that the operator has the necessary skills, knowledge, ability and judgement as appropriate for the classification. All exam questions must be validated." [emphasis added]*.

The 1999 Final Guidelines also require States to perform reviews of their operator certification programs, and recommends what should be included in that mandatory review:

> *"States must perform reviews of their operator certification programs. EPA recommends that States perform periodic internal reviews and occasional external/peer reviews. Examples of items to review include**: regulations, exam items for relevancy and validity**, compliance, enforcement, budget and staffing, training relevancy, training needs through examination performance, and data management system." [emphasis added]*.

EPA issued responses to key comments as part of the federal notice process. Importantly, EPA stated in 1999 they received several comments on the type of operator certification exam that should be required by the guidelines. In part EPA's answer was:

> *"EPA believes that the type of test that best measures the knowledge, skills, ability, and judgement of an operator for a particular classification level **should be left up to the State that is responsible for the design and administration of the test.** EPA received several comments on the requirement that exams be State-validated. Some commenters asked for clarification. In the final guidelines, EPA eliminated the word ''State'' from the above phrase. For clarification, EPA included a definition of ''validated exam'' in the final guidelines." This is the definition of validated exam published in 1999 "Validated Exam—An exam that is independently reviewed by subject matter experts to ensure that the exam is based on a job analysis and related to the classification of the system or facility".* [emphasis added].

The 2001 Final Additions to the Final Guidelines require each state operator certification program to include essential elements of "nine baseline standards" as follows:

*"Each State operator certification program **must include** as a minimum the essential elements of the nine baseline standards described below. Essential elements to avoid DWSRF withholding are introduced by words such as "**the States must**." For each essential element, **the State must describe how its operator certification program complies with the requirement**. Additionally, several of the baseline standards include **highly recommended elements** that are intended to complement, improve, and expand the parameters of essential elements of an operator certification program.*

. . . .

The Final Guidelines for the Certification and Recertification of the Operators of Community and Nontransient Noncommunity Public Water Systems contain nine baseline standards that states are required to adopt and implement in their operator certification programs. In particular, Baseline Standard No. 3, Operator Qualifications, specifies that state programs must require that, for an operator to become certified, the operator must "take and pass an exam that demonstrates that the operator has the necessary skills, knowledge, ability and judgement as appropriate for the classification".

*Furthermore, this baseline standard specifies that **"all exam questions must be validated".** However, it does not require that the entire exam be validated.*

. . . .

*EPA believes that examinations given by states **must contain validated questions** and that each state **must have a process** for ensuring that all of the subject areas necessary to test an operator's knowledge, skills, ability and judgement for a particular classification level are appropriately covered in each certification exam. **This process should include a review of the exam by subject matter experts, as determined by the state, to ensure that the exam is based on a job analysis and related to the classification of the system or facility.** EPA encourages states to develop a database of validated exam questions which will allow states the flexibility to offer a variety of exams for each class of operator. Because EPA has decided not to mandate a "validated exam" as opposed to an exam of validated questions, the language in Baseline Standard No. 3 will not be changed. EPA is deleting the definition of "Validated Exam" from the guidelines.*

. . .

***EPA has awarded a grant to the Association of Boards of Certification [ABC] to develop a guidebook on exam validation to assist states with the validation process.** The guidebook is scheduled to be completed in August 2001. . . .*
[emphasis added]

40 C.F.R. § 35.3500(b) incorporates by reference the 1999 Final Guidelines and the 2001 Final Additions. 40 C.F.R. § 35.3500(b) states, "This

subpart supplements section 1452 of the Safe Drinking Water Act by codifying statutory and program requirements that were published in the Final Guidelines for the Drinking Water State Revolving Fund program (EPA 816–R–97–005) signed by the Assistant Administrator for Water on February 28, 1997, *as well as in subsequent policies*." (emphasis added). The "Final Guidelines for the Drinking Water State Revolving Fund program" (EPA 816–R–97–005) states on page 16 that the Administrator of the EPA "will withhold 20% of a State's funds unless the State has adopted and is implementing a program for certifying operators of community and nontransient, noncommunity public water systems. This withholding provision will begin two years after the Administrator publishes guidelines for certification of operators."

WPI and Third-Party Testing Providers

To assist states in implementing their operator certification programs in conformity with the SDWA, on January 6, 2000, the EPA issued "EPA Operator Certification Guidelines: Implementation Guidance". In this material, the EPA expressly authorizes states to contact Water Professionals International (WPI)(formerly "ABC" which is referenced above in the 2001 Final Additions) or other third parties such as state agencies and universities to help a state develop validated exams. WPI is an organization within the water and wastewater sector that provides testing services for the operator certification programs of its members. See https://www.gowpi.org/. WPI offers validated certification exams (standardized and customized) in the categories of water treatment, water distribution, wastewater collection, wastewater treatment, water/wastewater laboratory, and plant maintenance. The "Implementation Guidance" states, "The **Association of Boards of Certification** can assist States with validating exams and with general validation procedures. Some States may have other State agencies that can assist with the validation process. Local universities may also employ psychometricians that can assist States in developing validated exams." [emphasis added].

The EPA's Implementation Guidance expressly authorizes a State to enter into a contract with any third party with respect to any portion of its operator certification program "so long as the State can continue to provide sufficient resources to fund and sustain their program". The EPA's "Desk Guide for Reviewing State Operator Certification Program Annual Reports" contains an "Annual Report Review Checklist", which is used by the EPA's regional operator certification personnel when making DWSRF withholding decisions. The checklist for "Operator Qualifications" includes a review of a State's "exam question validation activities for the year" which should include a "short summary" on the use of "…subject matter experts, psychometrician".

To utilize WPI's testing services, including its exam validation services, a State must become a regulatory member of the WPI Certification Program. Almost every state, including Tennessee (through the Division of Water Resources), is a regulatory member of WPI and utilizes its testing services. Since 2011 until the present, the Board has been utilizing the testing services provided by WPI to develop its validated operator certification exams. The certification exams from 2011 until present were WPI's

validated, standardized exams developed in coordination with WPI and the State that included both a standardized portion and a customized, state-specific portion. Those exams included validated questions germane to the state system of classification of operators.

In 2019, the Board setup a stakeholder committee to advise the Board on whether or not Tennessee should continue to utilize a third-party testing provider to develop and validate exams. The stakeholder committee rejected contracting with a third-party service provider unanimously and recommended to the Board that TDEC must develop and validate exam questions exclusively with state personnel and resources. On September 12, 2024, the Board voted to approve the use of the standardized, validated exam offered by WPI for its Spring 2025 examination. WPI offers an option for States to use a 100% standardized exam or to customize a portion of that standardized exam to include state-specific regulatory questions that align with the State's promulgated categories of operators. It is my understanding that the agreement that the Board entered into with WPI is for a five-year term.

WPI's examinations consist of questions that undergo an extensive "validation process" supported by subject matter experts and psychometricians. WPI utilizes psychometricians to ensure its exam questions are "fair, valid, and legally defensible." As you may know, the Uniform Guidelines on Employee Selection Procedures issued pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (Title VII)(42 U.S.C. 2000e-8,2000e-12), were adopted to assist licensing and certification boards, such as the Board, and other covered employers to comply with the requirements of Title VII prohibiting the use of tests and selection procedures that discriminate on the basis of race, color, religion, sex, and national origin. Those uniform guidelines encourage the use of examinations that are "valid" to ensure the questions are reliable, neutral, and free from bias. See 29 CFR Part 1607.

EPA Guideline #2 with respect to the "Classification of Systems, Facilities, and Operators" states:

> *"A State's program must meet the following requirements: • It must classify all community and nontransient noncommunity water systems based on indicators of potential health risk, which for example may include: (a) complexity, size, source water for treatment facilities, and (b) complexity, size for distribution systems. It must develop specific operator certification and renewal requirements for each level of classification."*

WPI's 100% standardized exam, where a State does not opt for a customized state-specific portion, does not align with the State's current classifications. WPI's grade IV exam was developed for someone with over 1800 hours of technical training, with 4 years of experience (2 years must be as an operator in direct responsible charge of a system). 1800 hours of technical training equates to nearly one year of coursework. TN's classifications in Rule for a Grade IV require no amount of technical training but are instead based on the complexity of the specific water system and require work

experience of 5 years with no requirements for direct responsibility of a system. WPI Grade III examinations are developed for examinees that possess 4 years of experience (2 years of direct charge) and 900 hours of training. State requirements for a Grade III applicant must have 1 year of experience and no direct charge requirements.

EPA Guideline #3 states:

> *"States must require the following for an operator to become certified: • Take and pass an exam that demonstrates that the operator has the necessary skills, knowledge, ability and judgement* ***as appropriate for the classification****." Emphasis added*

WPI has a process structured for an applicant to advance from lower certification grades to higher certification grades over time and is not based on the complexity of operations of specific TN facilities. Further, WPI has exams based on ISO Global standards which do not include any TN or Federal Rule questions. The Certification Guidelines A. Public Health Objectives state:

> *"The public health objectives of the guidelines are to ensure that: • Customers of any public water system be provided with an adequate supply of safe, potable drinking water. • Consumers are confident that their water is safe to drink. • Public water system operators are trained and certified and that they have knowledge and understanding of the public health reasons for drinking water standards."*

Federal Preemption

As you know, state law is preempted to the extent that Congress has pre-empted the field of a particular area of regulation. The SDWA evinces Congress' intent to occupy the field of public drinking water regulation. Mattoon v. City of Pittsfield, 980 F.2d 1, 4 (1st Cir.1992); see also Arco Oil and Gas Co. v. E.P.A., 14 F.3d 1431, 1436 (10th Cir.1993). In the field of public drinking water regulation, state regulation is pre-empted by the SDWA. Bath Petroleum Storage, Inc. v. Sovas, 309 F. Supp. 2d 357, 366 (N.D.N.Y. 2004). State law may also be pre-empted if it actually conflicts with federal law. Even "where Congress has not completely displaced state regulation in an area, state regulation may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

If there are questions or if more information is required, please contact me. As always, your assistance is deeply appreciated.

Sincerely,

Representative Kelly Keisling